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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/037,941	01/03/2002	Carolyn Jean Cupp	112701-330	7917

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29157 7590 07/30/2003

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EXAMINER	
HENDRICKS, KEITH D	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 07/30/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/037,941	Applicant(s) CUPP ET AL.	
	Examiner Keith Hendricks	Art Unit 1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____ .

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-33 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 1-33 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 20-21 and 29-31 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 20 is indefinite for the recitation of the phrase "comprising the step of chewing on dried pet food...". While the claim preamble recites "a method of reducing calculus and plaque build-up on a pet's teeth", it is unclear as to how this claim would actually involve the pet, given the recited active language of "comprising the step of chewing on dried pet food...". The claim does not clearly state that the pet consumes or chews on the food, and thus it must be assumed that the reader, i.e. one skilled in the art, is to chew on the food. It is suggested that positive, active language be utilized, such as feeding a pet, or orally administering the pet food to a pet, if supported by the specification.

In claim 21, it is noted that the phrase "one size kibble being larger than the other size kibble" is redundant, in view of the phrase "at least two different sized kibbles", recited previously in the claim. Furthermore, the phrase "one size kibble being larger than the other size kibble" necessarily limits the claim to two differently-sized kibbles, whereas this conflicts with the phrase "at least two different sized kibbles."

Claims 29-30 recite the limitation "at least one of the sized kibbles". However, as they depend from claim 28, there is insufficient antecedent basis for this limitation in the claims.

Claim 31 is indefinite for the recitation of the phrase "large number". The term "large" is a relative term which renders the claim indefinite. The term is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 7-12, 18, 20, 25, 27, 28, and 30-33 are rejected under 35 U.S.C. 102(b) as being anticipated by Collings et al. (EP 0 645 095).

Collings et al. disclose an extruded dog treat food product. The product comprises a structural matrix containing proteins, starches, carbohydrates and fiber such as cellulose (pg. 3). A typical cellulose fiber content is shown to be in the range of 2-10%. The mixture containing the starch and protein is gelatinized ("plasticized"), due to the high-temperatures of the extrusion process disclosed, and thus the end product contains denatured protein, as well as gelatinized carbohydrate. It is noted that the extrusion is done with a "heatable extruder having one or more helical transfer screws axially rotatable... with a restricted extrusion discharge passageway" (pg. 3), serving to cook and plasticize the mixture, thus providing a non-laminar flow of the mixture through the chamber(s). Following extrusion, the pet food thus produced has a final moisture level of about 6-10% (top page 4). Further, Collings et al. does not teach the use of a humectant. At mid-page 2, reference is made to a then copending application, 07/899,534, directed to a striated pet food, and at lines 30-40 of page 2, it is stated that, in contrast, Collings et al. are disclosing the production of a non-striated product, i.e. "a product that was not in a stratified condition."

Thus, the claimed invention is anticipated by the reference. Although the reference does not specifically disclose every possible quantification or characteristic of its product, including density data, the density of the product would have been within the instantly-claimed range of "less than 20.5 lb/ft^3, absent any clear and convincing evidence and/or arguments to the contrary. The reference discloses the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of ordinary skill in the art would recognize that the product density, among many other characteristics of the referenced product, would have been an inherent result of the product disclosed therein. Similarly, regarding instant claims 28 and 31-33, the resultant texture of the extruded product would also have been an inherent result of the disclosed product, based upon the same starting materials and methods of production. Furthermore, at page 5 the reference states that the "plasticized food" component "swells upon exiting the die due to flashing of moisture to steam producing an expanded structure" (lines 8-9). This process is similar to that found in the production of cheese puffs, which also expand upon exiting the heated extruder through a constrictive exit passageway, and also contain pockets of air and circular pores as a result of this process. The Patent Office does not possess the facilities to make and test the referenced product, and as a reasonable reading of the teachings of the reference has been applied and does anticipate the instant claims, the burden thus shifts to applicant to demonstrate otherwise.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-6, 13-17, 19, 21-24, 26 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Collings et al., in view of Hand et al. (US PAT 5,431,927).

Collings et al. is taken as cited above. Further, Collings et al. state that "the extruded strand swells upon exiting the die due to flashing of moisture to steam producing an expanded structure. The strand is cut into 46 to 55 mm lengths of pieces or chips" (pg. 5, ln. 8-10) and then further dried. The top of page 6 states that the extrudate was produced "in the form of an expanded strand 50.1 mm in length, 25 mm in width and 9 mm in depth. The strand product swelled upon issuing from the die... [and] was cut into 10 mm thick wavy-shaped chips."

Hand et al. provides a similar pet food product comprising a carbohydrate source, protein, and fiber, wherein the product yields an expanded striated structural matrix. Humectants are not required, and the mixture is extruded to form the product with a density ranging from "about 10 to about 35 lbs/ft^3" (top col. 6). At column 5, the reference states that the product may be in any of several shapes, and is preferred as a disc-shaped pellet having a thickness of about 0.32 to 0.70 inch (about 8mm to 17mm), and a length/width "diameter of about 0.7 to about 1.2 inch" (17.7 - 30.48 mm). The example product was cut into about 12mm (0.5 inch) thick pellets and fed to dogs. The Hand et al. patent stems from application serial number 07/899,534.

It would have been obvious to one of ordinary skill in the art to have produced the product as shown by Collings et al., with varying sizes similar to those disclosed by the reference, as this was commonly performed in the art, as demonstrated by Hand et al. Initially, it is noted that the Hand et al. document is that referred to at page 2 of Collings et al. The pet food of Hand et al. differs from Collings primarily in that it is formed as a striated product due to the approximate laminar flow conditions utilized, whereas Collings et al. provide a similar product, but which possesses randomly-distributed fibrous ingredients and thus are not in a striated form, due to the non-laminar flow conditions. See both page 2 of Collings et al. and column 3 of Hand et al. Collings et al. also state that they have overcome the

difficulties of product breakage. While the products disclosed by Collings et al. differ by a thickness dimension of approximately only a few millimeters, it would not have involved an inventive step for one of ordinary skill in the art to have cut and produced the final pet food in slightly larger dimensions, as shown by the similar and related products of Hand et al. There does not appear to be a patentable distinction between the slightly larger dimensions as a matter of 2-4 mm of the pet food product, absent any clear and convincing evidence and/or arguments to the contrary. Simple design choice of a known product, especially within known standards for similar products as shown by Hand et al., would not provide a patentable invention. This is especially true given the already similar dimensions taught by Collings et al. to those of the claimed invention.

Furthermore, regarding instant claims 21-24, it is noted that the products of Hand et al. are produced in varying sizes, for example, as stated at column 5 and 7, where "the strand is cut into 0.32 to 0.75 inch lengths to form pellets", and thus it would have been obvious to one of ordinary skill in the art to have provided the pet food of Collings et al. with this same technique. Finally, it is noted that, even with products mechanically cut at stated dimensions, one of ordinary skill in the art would expect that technically the individual product pieces would each differ slightly to some degree in one or more of thickness, length and/or width, due to mechanical cutting inconsistencies, degrees and conditions of drying, etc.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

i) Claims 1-33 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-24 of copending Application No. 09/154,646.

ii) Claims 1-33 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-32 of copending Application No. 10/052,949.

iii) Claims 1-33 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-20 of copending Application No. 09/936,672.

Although the conflicting sets of claims are not identical, they are not patentably distinct from each other because they are each directed to pet food chew products (and methods of use) of various sizes, with the same density properties and overlapping ingredients of denatured proteins and starches, insoluble fibers, etc.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

KEITH HENDRICKS
PRIMARY EXAMINER